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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JASON SCOTT JORDAN, Defendant and Appellant.	E063761 (Super.Ct.No. RIF1303454) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Reversed.

Edward Mahler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Andrew Mestman, Arlene A. Sevidal and Britton B. Lacy, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jason Scott Jordan appeals from the denial of his petition for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act. (Pen. Code, § 1170.18.) Defendant pleaded guilty to second degree burglary and to misdemeanor unauthorized use of access card account information. The trial court concluded defendant used another person's credit card and identification, which the court characterized as identity theft and, therefore, defendant did not act with the intent to commit a larceny and was not entitled to be resentenced to misdemeanor shoplifting under Proposition 47. (Pen. Code, § 459.5.)

We conclude the trial court erred. Defendant's crime of false pretenses theft satisfied the larceny element for shoplifting under Proposition 47. Characterizing defendant's crime as identity theft does not alter our conclusion. Finally, we reject the People's request for leave to withdraw from the plea bargain and to reinstate a dismissed charge of identity theft. The order is reversed and remanded for the trial court to determine whether defendant poses an unreasonable risk to public safety.

I.

PROCEDURAL BACKGROUND

The People charged defendant by felony complaint with one count of second degree burglary (Pen. Code, § 459, count 1; all additional statutory references are to the Penal Code), identity theft (§ 530.5, subd. (a), count 2), and misdemeanor unauthorized use of access card account information (§ 484g, subd. (a), count 3). The complaint also

alleged defendant suffered five prior prison terms within the meaning of section 667.5, subdivision (b).

The People negotiated a plea agreement with defendant whereby defendant agreed to plead guilty to second degree burglary and misdemeanor unauthorized use of access card account information, as alleged in counts 1 and 3, and to admit to suffering five prior prison terms in exchange for a sentencing recommendation of six years four months. Defendant pleaded guilty to second degree burglary as alleged in count 1, and in his plea colloquy admitted that he "willfully and unlawfully entered a [drug store] . . . in Corona with the intent to commit a theft or a felony." Defendant also pleaded guilty to count 3 and admitted to suffering five prior prison terms. The trial court sentenced defendant to the low term of one year four months for count 1, 180 days in county jail on count 3 to be served concurrently to the term on count 1, and to one year for each of defendant's five prior prison terms to run consecutively to the term on count 1, for a total term of six years four months. The trial court granted a request from the prosecutor to dismiss count 2 pursuant to section 1385. Defendant did not appeal from the judgment, and it became final.

A little over four months after he was sentenced, defendant filed a form petition in the superior court requesting that he be resentenced to a misdemeanor under Proposition 47. The People opposed the petition, arguing defendant's burglary conviction did not qualify as misdemeanor shoplifting because he entered the drug store "with the intent to commit ID theft." The judge assigned to hear the petition noted the

issue was whether defendant had the requisite intent for shoplifting under section 459.5 and set a hearing.

Defendant testified at the hearing that he entered the drug store with the intent to steal so he could buy drugs. Defendant testified the credit card he used was not his own, and that the amount he charged to the card was under $400. On cross-examination, the prosecutor asked defendant if he used a fake identification card, but the trial court sustained an objection on relevancy grounds from defendant's attorney and struck the testimony about the fake identification card.

Defendant's attorney argued defendant was entitled to be resentenced to misdemeanor shoplifting because he entered the drug store with the intent to steal and not with the intent to commit identity theft, and because defendant acquired property valued less than the jurisdictional amount of $950 set forth in section 459.5, subdivision (a). The trial court agreed the property defendant acquired was below the jurisdictional limit for misdemeanor shoplifting, but noted defendant's intent when he entered the drug store was to steal by using another person's credit card, which constituted identity theft. Defense counsel countered that defendant's intent was "to commit a larceny by trickery, by using somebody else's credit card." The trial court concluded defendant's intent to commit identity theft did not satisfy section 459.5 and, therefore, denied the petition.

Defendant timely appealed.

II.

DISCUSSION

A. *Standard of Review*

Whether Proposition 47 applies to defendant's conviction for second degree burglary is a question of statutory interpretation we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) "When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.)

B. *Proposition 47 Applies to the Offense of Second Degree Burglary Based on False Pretenses Theft When the Value of the Property so Acquired Is $950 or Less*

Defendant argues his second degree burglary conviction would have been misdemeanor shoplifting in violation of section 459.5 had Proposition 47 been in effect at the time of his offense and, therefore, he is entitled to resentencing under section 1170.18. According to defendant, his crime of producing another person's credit card with the intent to obtain products from a drug store qualifies as larceny within the

meaning of section 459.5. The issue of whether theft by false pretenses satisfies an intent to commit larceny within the meaning of section 459.5 is currently pending before our Supreme Court. (*People v. Gonzales*, review granted Feb. 17, 2016, S231171.) We conclude it does.

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id.* at p. 1092.) If a defendant qualifies for resentencing under Proposition 47, the trial court shall recall the felony sentence and resentence the defendant to a misdemeanor unless it determines, it its discretion, the defendant "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b); see *id.* subds. (b)(1)-(3) [listing factors to consider when determining dangerousness], (c) [defining "'unreasonable risk of danger to public safety'"].)

Among the crimes reduced to misdemeanors by Proposition 47 "are certain second degree burglaries where the defendant enters a commercial establishment with the intent to steal. Such offense is now characterized as shoplifting as defined in new section

459.5." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) Section 459.5, subdivision (a), provides: "*Notwithstanding Section 459*, shoplifting is defined as entering a commercial establishment *with intent to commit larceny* while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." (Italics added.) "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).)

The People do not dispute defendant's second degree burglary conviction involved him entering a commercial establishment during regular business hours and acquiring less than $950 in property. However, the People contend defendant's burglary conviction does not qualify as shoplifting under section 459.5 because he did not commit the burglary with the intent to commit a larceny. We conclude otherwise.

The People first contend defendant is not entitled to misdemeanor resentencing because his intent was to commit identity theft, not to commit a larceny. Defendant did not plead guilty to identity theft under section 530.5, subdivision (a), as alleged in count 2, and that count was dismissed. Rather, defendant admitted that he committed a second degree burglary by entering a drug store with the intent to commit theft or a felony. We find the recent opinion in *People v. Garrett* (2016) 248 Cal.App.4th 82

(*Garrett*) to be persuasive on this point.[1] "A given act may constitute more than one criminal offense. It follows that a person may enter a store with the intent to commit more than one offense—e.g., with the intent to commit both identity theft *and* larceny. Furthermore, Section 459.5 mandates that *notwithstanding* Penal Code section 459, a person who enters a store 'with the intent to commit larceny' *shall be punished as a misdemeanant* if the value of the property to be taken is not more than $950. (§ 459.5, subd. (a).) Subdivision (b) further provides that any act defined as shoplifting 'shall be charged as shoplifting' and may not be charged as burglary or theft of the same property. (§ 459.5, subd. (b).) Thus, even assuming defendant intended to commit felony identity theft, he could not have been charged with burglary under Penal Code section 459 if the same act—entering a store with the intent to purchase merchandise with a stolen credit card—also constituted shoplifting under Section 459.5. Accordingly, the dispositive issue is whether that act fell within the definition of 'shoplifting' under Section 459.5." (*Garrett*, at p. 88.)

In the alternative, the People argue defendant did not enter the drug store with the intent to commit larceny, and that false pretenses theft does not satisfy the intent for misdemeanor shoplifting. In 1927, the formerly distinct crimes of larceny, embezzlement, and obtaining property by false pretenses were statutorily consolidated

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[1] The Supreme Court granted review in *Garrett*, *supra*, 248 Cal.App.4th 82 on August 24, 2016, S236012. Under a recent amendment to rule 8.1115 of the California Rules of Court, we may rely on the Court of Appeal's decision as persuasive authority while review is pending. (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

under the definition of "theft" found in section 484. (*People v. Avery* (2002) 27 Cal.4th 49, 53, fn. 4; *People v. Davis* (1998) 19 Cal.4th 301, 304.) "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, *by any false or fraudulent representation or pretense*, defraud any other person of money, labor or real or personal property . . . is guilty of theft." (§ 484, subd. (a), italics added.) At the same time the Legislature adopted the definition of theft in section 484, it adopted section 490a, which provides: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted thereof." Burglary is defined as entering a building or structure "with intent to commit grand or petit larceny or any felony." (§ 459.) "Thus, the Legislature has indicated a clear intent that the term 'larceny' as used in the burglary statute should be read to include all thefts, *including 'petit' theft by false pretenses*." (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 31, italics added (*Nguyen*); accord, *People v. Parson* (2008) 44 Cal.4th 332, 354 ["An intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction."].)

The record demonstrates defendant entered a drug store with a stolen credit card and used it to purchase goods. In other words, defendant admitted he committed theft by false pretenses when he fraudulently passed off another person's credit card as his own to obtain products or services. (E.g., *Perry v. Superior Court* (1962) 57 Cal.2d 276, 282-

283 ["To support a conviction of theft for obtaining property by false pretenses, it must be shown: (1) that the defendant made a false pretense or representation, (2) that the representation was made with intent to defraud the owner of his property, and (3) that the owner was in fact defrauded in that he parted with his property in reliance upon the representation."].) Applying sections 484, subdivision (a), and 490a, we must conclude defendant harbored the intent to commit a larceny. (See *Garrett, supra,* 248 Cal.App.4th at pp. 88-90, review granted.) Because defendant entered a drug store with the intent to commit a larceny, his crime satisfied the intent for shoplifting under section 459.5, and he is entitled to reclassification and resentencing under section 1170.18.

The People counter that defendant's offense of theft by false pretenses does not constitute "larceny" as that term was defined at common law and, therefore, is not governed by section 459.5. For this proposition, the People cited *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*). We conclude *Williams* does not control this appeal.

In *Williams, supra*, 57 Cal.4th 776, the defendant used payment cards re-encoded with another person's credit card information to buy Walmart gift cards, then used force against a security guard who tried to detain him. (*Id*. at p. 780.) Among other things, a jury convicted Williams of four counts of second degree robbery in violation of section 211. (*Williams*, at p. 780.) Williams argued his robbery convictions could not stand because his theft by false pretenses did not satisfy the element of a "felonious taking." The Supreme Court agreed. The court concluded the element of a "felonious taking" for robbery (§ 211) found its roots in the common law crime of larceny

(*Williams*, at pp. 781-784), and that by using the phrase "felonious taking" in the robbery statute "the California Legislature in all likelihood intended to attach to the statutory phrase the same meaning the phrase had under the common law. [Citation.]" (*Williams*, at p. 786.) Under the common law, "larceny requires a 'trespassory taking,' which is a taking without the property owner's consent. [Citation.] . . . By contrast, theft by false pretenses involves the *consensual* transfer of possession as well as *title* of property; therefore, it cannot be committed by trespass." (*Id*. at p. 788.) Because Walmart consented to the sale of the gift cards, albeit under false pretenses, the court held "defendant did not commit a *trespassory* (nonconsensual) taking, and hence did not commit robbery." (*Ibid*.) Therefore, the court reversed the robbery convictions. (*Id*. at p. 790.)

The *Williams* court had to look to the common law to find the meaning of the undefined phrase "felonious taking" in the robbery statute (§ 211), and in doing so the court relied on the *common law* definition of larceny to conclude a person who commits theft by false pretenses has not committed a robbery. The common law definition of larceny is simply inapplicable here. Again, we find the decision in *Garrett* to be persuasive on this issue. (See, *ante*, fn. 1.) "As the *Williams* court recognized, Section 490a does not effect a change in the substantive law of larceny; rather, it provides a definition for use in statutory construction. Our task here is to construe the term 'larceny' as used in Section 459.5, not to discern the substantive offense of larceny. Thus, the plain text of Section 490a speaks directly to this task. Applying Section 490a, we

conclude that shoplifting requires an intent to commit theft, which is further defined by Penal Code section 484. This includes theft by false pretenses, encompassing defendant's conduct here." (*Garrett*, *supra*, 248 Cal.App.4th at pp. 89-90, review granted.)[2]

Finally, the People argue Penal Code section 459.5 is limited to the commonplace definition of shoplifting, i.e., theft of displayed merchandise from a store during business hours, and defendant's offense of theft by false pretenses does not fall within that meaning. We are not convinced the voters intended to limit Penal Code section 459.5 to the commonplace definition of shoplifting. The legislative analysist's analysis of Proposition 47 and the arguments in favor of and against Proposition 47 contain nothing to support the People's assertion. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) pp. 35-39, at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [as of Dec. 8, 2016].) More importantly, by defining the new statutory crime of shoplifting to consist of "entering a commercial establishment with intent to commit *larceny*" (Pen. Code, § 459.5, subd. (a), italics added), we must assume the voters were aware of section 490a and, therefore, intended the term "larceny" to incorporate all forms of theft and not

[2] For the same reason, we conclude the more recent decision in *People v. Vidana* (2016) 1 Cal.5th 632 does not require a different result.

merely those commonly associated with shoplifting. (See *In re Derrick B.* (2006) 39 Cal.4th 535, 540 [assuming voters were aware of Welf. & Inst. Code, § 203 and its judicial construction when they adopted Pen. Code, § 190.3].)[3]

Because the trial court denied defendant's petition with respect to count 1 based solely on its conclusion that defendant's burglary does not constitute shoplifting under section 459.5, we must reverse the order. We agree with the People that on remand the trial court may, in its discretion, determine whether defendant should not be resentenced because he poses an unreasonable risk of danger to public safety. (§ 1170.18, subds. (b), (c).)

C. The People Are Not Entitled to Withdraw from the Plea Bargain and to Reinstate a Dismissed Charge if Defendant is Resentenced Under Proposition 47

The People argue resentencing defendant under Proposition 47 would constitute a breach of the plea bargain on defendant's part, which entitles the People to withdraw from the plea bargain and to reinstate a dismissed count. The California Supreme Court

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[3] At oral argument before this court, the People relied on section 490.2, another provision of Proposition 47, which defines misdemeanor "petty theft" as "obtaining any property by theft" where the value of the property does not exceed $950. (§ 490.2, subd. (a).) According to the People, section 490.2 shows the drafter's of Proposition 47 and the voters who approved it knew how to distinguish between the generic term "theft" and the more specific term "larceny" and, therefore, the default rule of interpretation found in section 490a does not apply. The People did not make this argument in its brief, so it is waived. (*People v. Thompson* (2010) 49 Cal.4th 79, 110, fn. 13 ["Because counsel failed to raise this . . . argument in her briefs, to raise it at oral argument was improper."].)

recently rejected this same argument. (*Harris v. Superior Court* (Nov. 10, 2016, S231489) ___ Cal.5th ___ [2016 Cal.Lexis 9040].) The decision in *Harris* is binding on this court and completely disposes of the People's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of this court are binding upon and must be followed by all state courts of California"].)

Therefore, on remand, the People may not withdraw from the plea bargain and may not reinstate the dismissed count.

III.

DISPOSITION

The order denying defendant's petition for resentencing is reversed. On remand, the trial court may exercise its discretion to determine whether defendant poses an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).)

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McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.